SUPREME COURT, U. S.
MAY 5 1967
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No. ~~1367~~ 1324

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HOMER PHILLIPS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

R. EUGENE PINCHAM
CHARLES B. EVINS and
EARL E. STRAYHORN
12 West Garfield Blvd., Suite 200
Chicago, Illinois 60609
DRexel 3-3600

and

SAM ADAM
134 North LaSalle Street, Suite 1622
Chicago, Illinois 60602
CEntral 6-5543

Attorneys for Petitioner,
Homer Phillips.

The Schaffer Press, Inc.—ANdover 3-6850

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PETITION FOR WRIT OF CERTIORARI
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To the Honorable, The Chief Justice, and the Associate Justices of The Supreme Court of The United States.

Petitioner, Homer Phillips, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, Mr. Justice Kiley dissenting, which affirmed the District Court's judgment and sentence of ten years imprisonment for a violation of Title 21, Section 174, United States Code.

OPINION BELOW

No opinion was rendered in the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the United States Court of Appeals is unreported and is set forth in the appendix hereto, Appendix A, majority opinion pages 1a-9a, dissenting opinion, pages 9a-18a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 7, 1967. The Petition for Rehearing was denied, without opinion, on April 5, 1967.

The jurisdiction of this Court is invoked under Title 28, Section 1254, United States Code, 62 Stat. 928.

QUESTIONS PRESENTED

1. Where, on the trial of a one count indictment for the concealment of a narcotic drug seized from a dwelling at three o'clock in the afternoon in execution of a search warrant, does not the admission into evidence of the uncharged offenses of petitioner's dispensing of a package to petitioner's brother, twelve hours previously in a public tavern, petitioner's brother's subsequent flight in an automobile from the agents, the brother's running from the agents, his discarding of narcotics and the agents' arrest of petitioner's brother and retrieving of the discarded narcotics, violate petitioner's constitutional rights to due process of law and to be informed of the nature and cause of the accusation against petitioner?

2. Where the trial court summarily denies a pretrial petition to suppress evidence, without prejudice, was petitioner obligated to again renew the petition during the trial to avoid a waiver of his rights thereunder?

3. Does the affidavit in the case at bar set forth facts which establish probable cause for the issuance of a search warrant?

4. Where petitioner first denied possession of narcotics and then admitted its possession for the stated reason that he did not want his girlfriend, in whose apartment and presence the drugs were found, to go to jail, is not such a confession inherently involuntary and did not its admission into evidence violate petitioner's Fifth Amendment constitutional rights against self incrimination and of due process?

5. Did not the Government witness-agent's testimony that petitioner told him that he would not sign a statement because he did not want to go back to jail, and the juror's comment thereon to the agent while he was still in the witness chair violate petitioner's constitutional rights to a fair trial and due process of law?

CONSTITUTIONAL PROVISION, RULE AND STATUTE INVOLVED

The Fourth, Fifth and Sixth Amendments to the United States Constitution, Rule 41 (e) of the Federal Rules of Criminal Procedure and Title 21, Section 174, United States Code are involved herein and are set forth in Appendix B, pages 19a-21a.

STATEMENT OF CASE

The one count indictment charged petitioner, Homer Phillips, and the co-defendant, Melsia Ruth Delaney, with the unlawful concealment of a narcotic drug, heroin, on April 24, 1964 at Chicago, Illinois, in violation of Title 21, Section 174, United States Code. The narcotics, which the indictment charged the defendants with having con-

cealed, were seized in Delaney's presence by Federal Narcotic agents, in execution of a search warrant, from a telephone book in her first floor apartment at 8004 South Yale Street, Chicago, Illinois at approximately 3:00 P.M. on April 24, 1964. Petitioner was not in the apartment when the narcotics were seized. He was arrested several days later, on April 27, 1964, at his place of employment, (A. 63-64).[1]

Almost six (6) months prior to trial, defendant Delaney filed a petition to quash the search warrant and suppress the seized narcotics as evidence, (A. 6-12). The trial court summarily denied said petition without holding a hearing or taking evidence and without prejudice, (A. 12). One week thereafter, on June 4, 1965, and also prior to trial, so that petitioner could rely upon the constitutional invalidity of the search warrant and the seizure and to avoid any waiver of his rights thereunder, petitioner filed his motion to join in and adopt the Delaney petition to quash the search warrant and suppress evidence, (A. 12-14). Petitioner's motion to join in and adopt was allowed, (A. 12).

The trial commenced on November 9, 1965. In his opening statement to the jury, the Assistant United States Attorney stated that he expected the evidence to show the agents' seizure of narcotic drugs from the 1st floor apartment at 8004 South Yale Avenue at Chicago, Illinois on April 24, 1964 at about 3:00 P.M., (A. 36). The Prosecuting Attorney further stated to the jury that he expected the evidence to show that at about 2:00 A.M., some twelve hours before the agents' discovery of the narcotics in the premises, the agents observed Petitioner enter and followed him when he left the premises. Petitioner's coun-

[1] (A. 63-64) indicate the pages of the Appendix to the record filed on appeal and submitted herewith.

sel objected to this phase of the Prosecuting Attorney's opening statement and out of the hearing of the jury stated to the court, (A. 37):

> "Mr. Pincham: • • • I anticipate he is now getting into an area which is highly inflammatory, highly objectionable and certainly would be inadmissible in the trial of this case. The question here is, did these defendants or did my client have these narcotics hid in his possession on the date and time in question. Now, I think I am justified in surmising from the search warrant, from what is stated in the search warrant, that he proposes to show this jury what is alleged in the search warrant as the basis for getting the search warrant, that the agents saw him leave and go into a tavern and saw him hand a man a package and then later they arrested one of these men who had narcotics. That would be inadmissible on the trial of this case."

Defense counsel urged that the facts set forth in the affidavit for the search warrant, as a basis for the issuance of the search warrant, were inadmissible on the trial for the subsequent concealment of the drugs seized in the execution of the warrant, and again pointed out to the court the factual allegations and contents of the affidavit for the search warrant. (A. 37-38). The Government attorney responded, (A. 39):

> "Mr. Plunkett: • • • We are only asking the jury to draw an inference, • • •"

The Court ruled, (A. 39):

> "The Court: • • • You have a right to show the propensity of the defendant to have committed the crime of possession by showing evidence of possession within a reasonable time prior thereto and thereafter."

Defense counsel thereupon responded and urged, (A. 39):

> "We didn't come here anticipating defending the allegations of a search warrant, and this is what they are asking us to do * * *."

Finally, the Court ruled, (A. 39):

> "The Court: I don't think at this stage I should face it at all, my only question of the prosecution is, do you expect this to be connected up? If you say yes, I am going to go ahead."

Over defense counsel's vigorous objections, Federal Narcotic Agents Hill and Pringle, testified, (A. 40-42, 56-57, 59-62), that on April 24, 1964 at approximately 2:00 A.M., they observed Petitioner drive to and stop on Yale Avenue, enter 8004 S. Yale and exit about ten minutes later; Petitioner entered his car and drove to and parked in the 7100 block on Halsted Street; he entered the New Waikiki Lounge at 7112 S. Halsted; as Agent Hill walked past the tavern, through the front window he observed Petitioner hand Tommie Phillips an aluminum foil package, which Tommie "appeared to put in his pocket," (A. 41); Tommie and Johnny Littleton drove from the tavern, followed by Agents Hill and Pringle; in the 4100 block on South Federal, these agents curbed Tommie and Littleton's car, and identified themselves as Federal agents; Tommie jumped out of the car and ran through a Chicago Housing project; Agent Hill chased him on foot through alleys and down various streets, and as he did so, Agent Hill observed Tommie throw an aluminum foil package over a fence which surrounded a school; Agent Hill continued the chase and apprehended Tommie at the end of an alley. Agent Hill returned Tommie to the car, where Agent Pringle was waiting with Littleton, the driver; Agent Hill returned to where he saw Tommie

throw the package, Hill climbed the fence and recovered an aluminum foil package which contained a white powder; Agent Hill returned to the car and he and Agent Pringle took Tommie and Littleton to the Narcotic Bureau Office, where Agent Pringle performed a Marquis reagent on the white powder which was contained in this aluminum package, (A. 42).

Agents Hill and Pringle further testified that they thereafter, about 3:00 P.M. on April 24, 1964, in execution of a search warrant, seized a narcotic drug from a telephone directory in the living room of the first floor apartment at 8004 South Yale Avenue in the presence of defendant Delaney. As before stated, it was these narcotics that the indictment alleged the defendants to have concealed and for which they were on trial. Agents Pringle, Prziborowski and Hill arrested Petitioner on April 27, 1964 at the place of his employment at Ogden and Kedzie, Chicago.

At the conclusion of Agent Hill's direct examination, defense counsel moved the Court to declare a mistrial, or in the alternative strike Agent Hill's testimony of the Tommie Phillips' episode and instruct the jury to disregard it, (A. 46-50). Defense counsel urged, (A. 46, 47):

> "• • • We don't convict people by association, that we don't convict people by relationship. • • • We didn't come down here to meet that. • • • The issue in this case is simple: Did this defendant conceal a narcotic drug in the premises at 8004 S. Yale on the date in question? There is no case that authorizes this. • • • if that is not guilt by association, if that is not guilt by relationship, I suggest I can't think of a better example. • • • "We indict you for 120-something grams of narcotic drugs found at 8004 S. Yale Avenue, but when we bring you down here for trial, we are also going to try you for dispensing a narcotic drug to Tommie Phillips, under

the guise of proving what is in the indictment. We are also going to try you for Tommie Phillips running from an agent and throwing a package over the fence." * * * We can't overcome that Judge. * * * We are put to the impossible task of defending one brother as against another brother. * * * Judge, it is unfair. As this case now stands, we are put to the responsibility and to the task of defending against immaterial, irrelevant, prejudicial testimony not by either one of these defendants but by another person who is not before the bar, who we can't cross examine, who is not on trial. * * * We come here to meet what was seized in that house on the afternoon of April the 24th 1964, pursuant to a search warrant. * * *"

The trial court stated, (A. 50):

"The Court: Well, the case is just underway. I am going to deny the motion to withdraw a juror. Insofar as the incident with relation to a Tommie Phillips is concerned, I am going to allow the motion. I will instruct the jury to disregard any such testimony as evidence heretofore admitted which appeared to indicate that the defendant Homer Phillips on or before the date of the charge here passed a package to a man who the witness stated was the defendant's brother, who in turn drove to another location, jumped out of the car and fled and dropped the package and threw away the package, which package was picked up by the agent and later found to be narcotics, and to cast it out of the jury's mind, disregard it completely.

* * *

"I do this out of an abundance of caution and out of agreement with Mr. Pincham that it has become an erroneous admission into evidence of matters which are totally unnecessary to the establishment of the government's case and totally irrelevant and cannot on their face be admitted without the inferences to be drawn therefrom which are not capable of being drawn.

The Government attorney thereupon argued the admissibility of the Tommie Phillips' episodes, and concluded, (A. 50):

> "Mr. Plunkett: We are trying to prove Tommie Lee Phillips had narcotics which he obtained from Homer Phillips, that is all. • • •"

The trial Court reversed itself and denied the defense motion to strike the agents' testimony of the Tommie Lee Phillips' episodes and instruct the jury to disregard it, (A. 51, 52). Agent Pringle was then called as a Government witness and he too related these Tommie Phillips' episodes to the jury. Defense counsel's motions, at the close of the Government's case and the close of all the evidence, to strike the agents' testimony of the Tommie Phillips' episodes were denied, (A. 81, 89).

In her own behalf, defendant Delaney testified to the agents forcible entry into her apartment, without announcing their office or authority, their seizure of the package which contained the drugs and her lack of knowledge of the drug's presence in her apartment, (A. 82-85). Petitioner offered no evidence. The jury found Delaney and Petitioner guilty.

The Court subsequently granted defendant Delaney's motion for a new trial, stating, (A. 103):

> "• • • it is very difficult for me to feel the certainty with which the jury could have seen the knowledge on her part just from the fact that an agent picked up a telephone book and then she turns around and he says, 'I found this in the telephone book' • • • I don't believe that the jury had a clear basis upon which to find against her and I am going to allow her a new trial on your motion • • • I will proceed with sentencing Homer Phillips at this time."

Petitioner was sentenced to ten years imprisonment. Defendant Delaney was subsequently placed on probation on her plea of guilty to a lesser offense.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

CONFLICTS EXIST BETWEEN AND EVEN WITHIN THE UNITED STATES COURTS OF APPEALS ON THE ADMISSIBILITY OF EVIDENCE OF CRIMES NOT CHARGED IN THE INDICTMENT.

The dissenting opinion of Mr. Justice Kiley in the instant case, Appendix A, pages 10a-18a, dramatically expresses the conflict of the majority's holding of the admissibility of the Tommie Phillips' episode as evidence against Petitioner with the contrary holdings of the United States Courts of Appeals for the Ninth Circuit, in *Enriquez* v. *U.S.*, 314 Fed. (2) 703, 716, for the Seventh Circuit, in *Magee* v. *U.S.*, 261 Fed. (2) 609, and for the Second Circuit, in *Smith* v. *U.S.*, 283 Fed. (2) 760. But moreover, the majority's holding here directly conflicts and cannot be reconciled with the holding of this Court in *Boyd* v. *U.S.*, 142 U.S. 450, 35 L. Ed. 1077. In *Boyd*, the defendants were convicted of the murder of Dansby. On the trial, the Government's evidence not only established that the defendants committed the murder, but also that the defendants had committed several robberies. This Court pointed out that "in relation to these [robbery] matters, the witnesses went into details as fully as if the defendant had been put upon trial for the robberies they were, respectively, charged by the evidence with having committed." In the case at bar, the Government witnesses went into details of the Tommie Lee Phillips' episodes more fully than the offense charged and just as fully as if Petitioner had been charged with it and was on trial therefor. As Mr. Justice Kiley's dissenting opinion points out, Appendix A, Pages 15a, ". . .. its dramatic impact, must have confused the jury. This was

not only the most interesting story in the government's case, it was the first one told." In *Boyd*, in an attempt to justify the admission of the robbery episodes into evidence on the trial of the murder, the government argued that such evidence was admissible to establish the defendants' identification and intent. 35 L. Ed. 1078-1079. The trial judge instructed the jury that the robbery evidence could be considered by it in passing upon the question of the defendants' identity. In reversing the judgment of conviction, this Court held, 35 L. Ed. 1077, P. 1080:

> "But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. *They were collateral to the issues to be tried. No notice was given by the indictment of the purpose of the Government to introduce proof of them.* They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.* Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. *However depraved in character, and however full of crime their*

past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." (Italics added).

In the case at bar, the Tommie Lee Phillips' episodes "were collateral to the issue to be tried"; and "no notice was given by the indictment of the purpose of the Government to introduce proof of them." It prejudiced petitioner with the jurors and drew the jurors' minds away from the real issue. It tended only to prove to the jury that petitioner was a wretch whose life was of no value to the community. In the case at bar, as in *Boyd*, petitioner was "entitled to the full benefits of the rules prescribed by law for the trial of human beings charged with crime." Petitioner, as were the defendants in *Boyd*, "was entitled to be tried upon competent evidence, and only for the offense charged." 35 L. Ed. 1080.

In *U.S.* v. *Magee*, 261 Fed. (2) 609, the Court of Appeals for the Seventh Circuit itself relied upon and quoted from the aforementioned holding of this Court in *Boyd* and reversed. The majority holding in the case at bar that the Tommie Phillips' episode was admissible against petitioner is diametrically opposed to that Court's own previous holding in *Magee*. It likewise conflicts with the holdings in *Bowie* v. *U.S.*, (9th Cir.), 345 Fed. (2) 605; P. 609; *Hansford* v. *U.S.*, (Dist. of C. Cir.), 303 Fed. (2) 219; *Lambert* v. *U.S.*, (5th Cir.), 101 Fed. (2) 960; *Kraft* v. *U.S.*, (8th Cir.), 238 Fed. (2) 794; *Kempe* v. *U.S.*, (8th Cir.), 151 Fed. (2) 680, 686, 687, 689, 690, and *Massei* v. *U.S.*, (1st Cir.), 241 Fed. (2) 895, 902.

Mr. Justice Kiley's dissenting opinion in the case at bar succinctly expresses the basis for the inadmissibility of the Tommie Phillips' episode. As Mr. Justice Kiley aptly concluded, "Due process required that the jury try Homer Phillips on the crime charged." (Appendix A, page 18a.) The admission of this evidence of the un-

charged offenses likewise effectively abrogated petitioner's Sixth Amendment constitutional right "to be informed of the nature and cause of the accusation." Petitioner was taken by surprise and unprepared to defend against it. Because of the surprise admission of the evidence of these uncharged offenses, petitioner was also denied his Sixth Amendment constitutional right "to have compulsory process for obtaining witnesses in his favor" to refute it. Because the jury was permitted to predicate their finding of Petitioner's guilt on evidence of the acts of Tommie Phillips, who the Government did not call as a witness and who petitioner could not cross examine, petitioner was denied his Sixth Amendment constitutional right "to be confronted with the witnesses against him."

The trial court did not instruct the jury on the legal efficacy of the Tommie Phillips' evidence, even though the trial court stated during the trial, (A. 69):

> "The Court: I retain concern about the fact that the jury may be confused as to what drugs are the subject matter of this indictment. This is a concern to me. I will handle that in due course of time."

But the trial court failed to rectify its concern for the jury's confusion "as to what drugs are the subject matter of this indictment", and did not resolve and clarify the jury's confusion, as he stated he would do. The trial Court did not instruct the jury that the Petitioner was not charged in the indictment and was not on trial for the commission of the Tommie Lee Phillips' transactions. The Court did not instruct the jury as to what offense the Petitioner was charged with having committed, or that the indictment charged petitioner with the concealment of the narcotic drugs seized from 8004 S. Yale Avenue on the afternoon of April 24, 1964. For these reasons the defendants objected to the Court's charge to the jury, (A. 97), which objections were overruled, (A. 98). The

jury was compelled to conject and speculate as to whether petitioner was charged with and on trial for the Tommie Phillips' narcotics transactions or the concealment of the narcotics seized from the first floor apartment at 8004 S. Yale Avenue, and remained in that same state of confusion with which the trial court was expressly concerned. The jury was allowed, and indeed required, to hazard and surmise that petitioner was charged with the commission of both. Having heard evidence of the commission of these several separate offenses and not having been instructed as to which of these offenses the indictment charged, the jury's verdict finding petitioner guilty in manner and form as charged in the indictment is at best a sheer guess. The jury could not and did not understandingly or informatively return a verdict.

The trial court's charge, set forth in the Court of Appeals majority opinion, Appendix A, page 7a, that the indictment charged the crime of concealment and possession of narcotics and that it was the jury's decision whether the government had proven guilt beyond a reasonable doubt, was completely inadequate to apprise the jury that Petitioner was charged with the 8004 S. Yale narcotic concealment and not the Tommie Phillips' episodes. This charge likewise did not apprise the jury of the legal effect of the Tommie Phillips' incidents. As Mr. Justice Kiley's dissent quite accurately points out, this charge was equally "broad enough to apply to both sets of facts."—the 8004 S. Yale narcotic concealment as well as the Tommie Phillips' episode. (Appendix A, p. 16a.)

From a mere cursory examination of the colloquy on the settling of the instructions, set forth at Appendix C, pages 22a-25a it is patently obvious that defense counsel requested an instruction on the legal efficacy of the

Tommie Phillips' transaction, and that the trial court's failure to so instruct and was not due to defense counsel's failure to request such an instruction as the majority opinion erroneously suggests. As Mr. Justice Kiley's dissenting opinion correctly points out, the trial court's failure to charge as requested by defense counsel was due to the trial court's expressed decision not to give "the instruction suggested by the defense" and because the trial court did not want to instruct "upon the facts of the case." The trial court further stated that such an instruction was "unnecessary." (Appendix C, p. 24a.)

There was no evidence that the Tommie Phillips' package contained a narcotic drug. The agent testified that he submitted the package to the U.S. Chemist. The Chemist testified that he examined "a" package submitted to him by the agent and that its contents, which he destroyed, was a narcotic drug. The Chemist did not testify, and there is no evidence in the entire record, that the package which he examined and about which he testified was the Tommie Phillips' package submitted to him by the agent. The majority holding of the Court of Appeals in the case at bar notwithstanding, the jury's verdict cannot give legal viability to such an evidentiary deficiency.

The majority holding in the case at bar, Appendix A, page 6a, that, "Without objection, the District Court's instructions concluded that both intent and knowledge are ingredients of this crime", is manifestly erroneous. An examination of the colloquy on the settling of the instructions, conspicuously reveals that defense counsel vigorously objected to this instruction, Appendix C, page 22a. The trial court first ruled that it would refuse this instruction, Appendix C, page 22a, then reversed itself and stated that it would give it, Appendix C, page 24a. Appendix C further reveals that defense counsel again

objected to this instruction immediately after it was given to the jury.

Even assuming that intent and knowledge are essential ingredients of the offense charged, *Morrissette* v. *U.S.*, 342 U.S. 246, upon which the majority of the Court of Appeals relied, is no authority for the admission of the Tommy Phillips' episode. In *Morrissette*, the defendant testified that he had no intention to steal metal casings from a bombing range, and that he thought that the casings had been abandoned. This Court held that it was error for the trial court to refuse to permit the defense counsel to argue the lack of the defendant's intent to commit a theft. In the case at bar, petitioner did not testify and did not put in issue his intent or knowledge. And under the offense charged, Title 21, Section 174, evidence of possession, which possession can be constructive as well as actual, is sufficient "to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." The statute so states. Inasmuch as petitioner offered no explanation of his possession his knowledge and intent was not in issue. Again, as forcible stated in Mr Justice Kiley's Dissent, Appendix A, Page 13a, "Moreover there was no substantial issue of intent. . . . A different question would be presented if the defendant had specifically raised the issue of knowledge and intent. . . . But, in fact, the Defendant did not take the stand or offer other evidence on this issue," or on any other issue, Petitioner presented no evidence. Evidence of the Tommy Lee Phillips' episode was inadmissible and *Morrissette* does not authorize its admission.

Defense counsel's knowledge of the alleged Tommy Lee Phillips' episode was gleaned solely from the affidavit for the search warrant, which had been reviewed and studied by him in preparation of the motion and petition to quash the search warrant. Quite naturally, the prose-

cutor's reference to the facts contained therein in his opening statement triggered defense counsel's objections thereto, and defense counsel was indeed surprised at the prosecutor's intent to introduce it. Defense counsel expressed his surprise in objecting to the prosecutor's opening statement, (A. 39). This surprise precluded the presentation of a defense against the evidence of the uncharged offenses. Petitioner was not tried in accordance with the Constitution and laws of the land.

II.

AN INTER-CIRCUIT CONFLICT EXISTS IN THE INTERPRETATION OF THE REQUIREMENT OF A HEARING ON A MOTION TO SUPPRESS EVIDENCE UNDER RULE 41 (e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The trial court summarily denied the petition to quash the search warrant and to suppress the evidence, without holding a hearing or receiving evidence. The court did not reserve ruling on the petition. The motion was denied "without prejudice" against renewing it. The petition alleged, among other things, that the agents "with force and arms, illegally, forcibly, broke and entered into and upon Petitioner's aforesaid residence and home", (A. 7), "that the search warrant was illegally and improperly executed," (A. 9), and, that "the agents' entry upon petitioner's premises," were in violation of petitioner's constitutional rights, (A. 10). The petition prayed, (A. 11-12), that the affidavit and warrant be quashed, that the narcotics seized from the apartment be suppressed and that the agents be enjoined from testifying concerning said seizure as evidence against Petitioner. These allegations raised a factual issue and under the provisions of Rule 41 (e) of the Federal Rules of Criminal Procedure the trial court was required to "receive evidence on this

issue." The pertinent provision of the Rule provides that where the ground relied upon for suppression of evidence is that the warrant was illegally executed, *"the trial court shall receive evidence on the issue of fact necessary to the decision of the motion."* (Italics ours).

Almost six months after the trial court summarily denied the petition to quash the search warrant and suppress evidence, without prejudice, the cause came on for trial. On the trial defendant—Delaney testified that the agents forcibly broke and entered into her apartment without any prior notice, warning, pronouncement or announcement by them, (A. 84). Such entry was illegal. *Miller* v. *U.S.*, 357 U.S. 301; *Wong Son* v. *U.S.*, 371 U.S. 471; and *Woods* v. *U.S.*, 240 Fed. (2) 37. Because the manner in which the agents executed the search warrant and their failure to announce their office and authority and the purpose for which they sought admission into the apartment was not an issue on the trial, although the trial evidence thereon was conflicting, neither party pursued or developed this issue on the trial. This controverted factual issue was a law question which the Court should have determined on a hearing on the pre-trial motions, which the Rule required the Court to do.

In *U.S.* v. *Jones*, 362 U.S. 257, 4 L. Ed. (2) 697, 709, 86 S. Ct. 725, the officers in execution of a search warrant searched an apartment in which the defendant was present and found narcotics. Defendant's motion to suppress, filed prior to trial, was denied on the basis of his lack of standing. On the hearing of the motion there was a direct conflict between the defendants' and the agents' testimony on the method of execution of the warrant. In reversing on other grounds, this Court said, on the question of the illegal execution of the warrant, at page 709:

> "The trial revealed a direct conflict in the testimony on this matter. We cannot yield to the government's

> suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution."

One of the grounds relied upon by Petitioner in his post-trial motions was that the trial court erred in summarily denying Petitioner's pre-trial petition to quash the search warrant and suppress evidence without a hearing thereon, (A. 25). The trial court then took the position that it heard the petition to quash the search warrant and suppress evidence with the trial of the case, (A. 98). Both defense counsel advised the trial court that neither was aware of nor advised that the Court was so doing, (A. 99). The Government at this time orally took the position that the trial court was hearing the motions with the trial, (A. 99). However, the Government thereafter abandoned this position in the Government's written answer to Petitioner's post-trial motions, (A. 29-30), and took the position that Petitioner had waived a hearing on the motion.

The trial court may very well have been hearing the motion along with the trial. However, if that be so, it was the Court's obligation to clearly state this fact so that the defense could govern itself accordingly. The Court did not advise or inform the defense of this fact until the case was over. Petitioner was thus effectively, though undoubtedly, unintentionally prevented from presenting evidence on the factual question involved. The Court's inadvertent omission to inform counsel thus compounded the original error of failing to hold a hearing.

The Court of Appeals held that Petitioner waived his right to a hearing on the motion to quash and suppress by not renewing it during the trial. This holding is diametrically opposed to the trial court's holding. The trial court held that it heard the motion along with the trial

of the case. If this be so, then how could Petitioner have waived a hearing thereon, as the Court of Appeals holds? On the other hand, if Petitioner waived hearing thereon, then how could the trial court have heard the motion along with the trial of the cause, as the trial court held it did. These divergent holdings by the upper and lower courts have bound Petitioner in a vice from which he cannot extricate himself to get a hearing on his motion, nor appellate review of the trial court's ruling thereon.

The Court of Appeals holding in the case at bar that it was incumbent upon Petitioner to renew his motion to quash and suppress during the trial and that Petitioner waived it by not so doing is in direct conflict with the holding of the United States Court of Appeals for the District of Columbia in *Waldron* v. *U.S.*, 219 Fed.(2) 37.

In *Waldron*, the trial court overruled the defendants' pre-trial motion to suppress evidence. The Government contended on appeal that the defendant waived the point because of his failure to renew his motion during the trial. The Court of Appeals held otherwise, 219 Fed.(2) 37, pp. 40-41:

> "That Rule (41(e)) provides that a motion to suppress as evidence illegally seized property 'shall be made before trial * * * but the court in its discretion may entertain the motion at the trial.' The basic purpose of the rule is to prevent, so far as possible, the delay and attendant confusion resulting from attacks during a trial on the admissibility of illegally seized evidence; a trial would have to be interrupted and the jury recessed while the court heard the motion to suppress.
>
> "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during a trial. *A litigant is not required*—indeed he may possibly not be permitted—*to renew contentions upon which the*

court has ruled. Once the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly. *Of course a trial court may reverse itself on a point during trial, but that possibility does not create an obligation on the part of counsel constantly to renew their contentions.*

"It seems to us the same elementary principles must apply when a motion to suppress has been made under Rule 41(e) and denied by the court. . . . *Tho movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly.* To hold otherwise would be to inject a pure technicality, without a purpose, into the conduct of trials, requiring counsel to repeat a contention already disposed of in the proceeding; and this in respect to a waiver of a constitutional right. *The fact that the court might in its discretion entertain a motion to suppress during the trial does not make it obligatory upon parties to renew such motions during trial or to object in any other way to the evidence at the trial.*" (Italics added).

Mr. Justice Learned Hand, in *Keen* v. *Overseas Tankship Corp.*, 194 Fed.(2) 515, p. 519, for the Second Circuit, stated:

"Moreover, the plaintiff's failure later to repeat the objection, or to conform literally to Rule 51, was not a 'waiver' of the ruling against him (citing cases); he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him. *Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable*

> *that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again.*" (Italics added)

We respectfully submit that the Court of Appeals' reliance upon *Di Bello* v. *U.S.*, 369 U.S. 121, 129-130, note 9, 7 L. Ed. (2) 614, as authority for the proposition that it was incumbent upon Petitioner to renew the motion, denied prior to trial, is misplaced. This Court in *Di Bello* merely held that a trial court ruling on a motion to suppress is not an appealable error. Footnote 9 in *Di Bello* merely recites that the trial court may reserve ruling on the motion or hear the motion on the trial. With this we certainly have no quarrel. The question here is, must a defendant renew such motion during the trial when the trial court has already denied it? The question here is, whether or not the trial court's failure to inform petitioner that he is hearing the motion along with the trial of the case constitute a waiver by petitioner when he does not reassert the previously denied motion? *Di Bello* does not answer either question. Nor does *Cheng Wai* v. *U.S.*, 125 Fed. (2) 915, upon which the Court of Appeals also erroneously relies. *Cheng Wai* expressly states that,

> "• • • the proceeding to suppress evidence • • • is an independent proceeding and the order made thereon is appealable." 125 Fed. (2) 915, 916.

This is no longer the law under the abovementioned decision of this Court in *Di Bello.*

Morton v. *U.S.*, 147 Fed. (2) 28, P. 30, note 4; *U.S.* v. *Chieppa*, 241 Fed. (2) 635, pp. 637-638; and *Butler* v. *U.S.*, 153 Fed. (2) 993, 994,[2] upon which the Court of

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[2] The Silver Platter Doctrine, expressed in *Butler*, was overruled in *Elkins* v. *U.S.*, 364 U.S. 206, 4 L. Ed. (2) 1669, 80 S. Ct. 1437.

Appeals relies, are inapplicable here. Each of these authorities merely stand for the proposition that a motion to suppress evidence cannot be made for the first time during the trial of the cause "because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence." Petitioner's motion to quash and suppress, made long before trial, was certainly timely made. Petitioner has not had a hearing on his petition to quash and suppress. If he has, the Court of Appeals has not reviewed it and the waiver holding is in direct conflict with *Waldron* and unsupported by authority.

III.

THE HOLDING OF THE COURT OF APPEALS THAT THE AFFIDAVIT IN THE CASE AT BAR SETS FORTH FACTS WHICH ESTABLISHED PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT CONFLICTS WITH THIS COURT'S HOLDING IN VENTRESCA.

The affidavit for the search warrant did not set forth facts which established probable cause for the issuance of a search warrant. The trial court erred in not quashing the search warrant and suppressing the evidence under the provisions of Rule 41 (e) (2) and (4) of the Federal Rules of Criminal Procedure and Petitioner's Fourth Amendment constitutional rights.

The Court of Appeals left forever buried in the Court's archives the specific language of the affidavit. The majority opinion summary of the affidavit's contents is factually abundantly generous and grossly misleading. The affidavit is set forth at Appendix D, 26a-28a.

We submit that an examination and analysis of the instant affidavit patently discloses that it contains merely

a hodge-podge of baseless conclusions, intermingled with a smattering of isolated facts, uninvolved with the premises sought to be searched and unconstitutionally combined under the formalistic coverall of probable cause. It's validity conflicts with *Bamboy* v. *U.S.*, 24 Fed. (2) 512; *Dixon* v. *U.S.* 334 Fed. (2) 322, P. 323, 324; *Johnson* v. *U.S.*, 113 Fed. Supp. 359, 360; and the Seventh Circuit's own holding in *U.S.* v. *Whitlow*, (7th Cir.), 339 Fed. (2) 975, 978; *Beck* v. *Ohio*, 379 U.S. 89, 13 L. Ed (2) 142, P. 148.

This Court has steadfastly held that the Fourth Amendment right of privacy "should receive a liberal construction." *Gouled* v. *U.S.*, 255 U.S. 298, P. 304; *Go-Bart Lumber Co.* v. *U.S.*, 282 U.S. 344, P. 357; *Weeks* v. *U.S.*, 232 383, 58 L. Ed. 652, P. 655. Likewise this Court has ardently held that search warrants must be strictly construed. *Sgro* v. *U.S.*, 287 U.S. 206, P. 210. And see *Keiningham* v. *U.S.*, 287 Fed. (2) 126, P. 129.

The Court of Appeals relied upon this Court's holding in *Ventresca* v. *U.S.*, 380 U.S. 102, as authority for upholding the validity of the instant affidavit and search warrant. Surely, this Court did not intend in *Ventresca* to obliterate or minimize the necessity of facts to establish probable cause for the issuance of a search warrant. Yet the Court of Appeals' interpretation of this Court's language in *Ventresca* and the Courts quote therefrom in the case at bar has given *Ventresca* just such an erroneous construction. The Court of Appeals' interpretation of *Ventresca* was not only erroneous but It's reliance thereon was likewise misplaced in upholding the validity of the instant affidavit. In *Ventresca*, the agents' nine days surveillances of the premises sought to be searched were set forth in minute factual detail. The affiant-agent particularly set forth and itemized what was seen, by whom it was

seen and when it was seen on the premises, as well as the owner's and visitors' activities on the premises. This Court summarized the minutely detailed facts recited in the *Ventresca* affidavit for the search warrant as follows, 13 L. Ed. (2) 684, P. 686:

> "The affidavit then described seven different occasions between July 28th and August 30th, 1961, when a Pontiac car was driven into the yard to the rear of Ventresca's house. On four occasions the car carried loads of sugar in sixty pound bags; it made two trips loaded with empty tin cans; and once it was merely observed as being heavily laden. Garry, the car's owner, and Incardone, a passenger, were seen on several occasions loading the car at Ventresca's house and later unloading apparently full five gallon cans at Garry's house late in the evening. On August 28th, after a delivery of empty tin cans to Ventresca's house, Garry and Incardone were observed carry from the house cans which appeared to be filled, and placing them in the trunk of Garry's car. The affidavit went on to state that 'at about 4:00 a.m. on August 18th, and at about 4:00 a.m. on August 30th, investigators smelled the odor of fermenting mash as they walked along the sidewalk in front of Ventresca's house. On August 18th, they heard, at or about the same time, . . . August 18th, they heard, at or about the same time, . . . certain metallic noises.' On August 30th, the day before the warrant was applied for, they heard (as they smelled the mash)' sounds similar to that of a motor or a pump coming from the direction of' Ventresca's house."

A comparison between the agents' specific and detailed observations of their surveillances in the *Ventresca* affidavit with the gross absence of such detailed facts of the agents' surveillances in the instant affidavit reveals that the contrast between the affidavits is most startling. The agents' detailed recitations, observations and chronological

surveillances are set forth in the *Ventresca* affidavit. It is the absence of the agents' detailed factual recitations, observations and chronological surveillances of the premises sought to be searched that precludes the instant affidavit from establishing probable cause for the issuance of a search warrant to search the desired premises. The elaborate factual recitations in the *Ventresca* affidavit for the search warrant being the governing standard, it is patently obvious that the meager allegations in the affidavit for the search warrant in the instant cause cannot constitutionally stand.

IV.

THE ADMISSION INTO EVIDENCE OF PETITIONER'S INHERENTLY INVOLUNTARY CONFESSION AND HIS PREVIOUS CRIMINAL RECORD AND THE JUROR'S CONVERSING WITH THE GOVERNMENT WITNESS-AGENT IN THE JUROR'S PRESENCE, WHILE THE WITNESS WAS STILL ON THE STAND, DENIED PETITIONER A FAIR TRIAL AND CONFLICTS WITH THIS COURT'S DECISION.

Agent Hill testified that he and Agent Pringle arrested Petitioner on April 27, 1964, in the New Bonneville Lounge in Chicago. Agent Hill was then asked by the Government attorney, (A. 45-46):

> Q. After that discussion, did you have further discussion?
>
> A. Yes, sir. Agent Pringle asked Phillips if the heroin belonged to him and he said—well, first he denied it, * * * he first said no, then he said he didn't want to see Ruth go to jail. He said it was his stuff."

Defense counsel's objection and motion to strike this testimony were overruled, (A. 46). This confession on its face was inherently involuntary. This confession on its face was motivated and induced by fear. After first denying

ownership, Petitioner confessed that the narcotics were his to prevent Melsia Ruth Delaney, his girl friend, from going to jail and being imprisoned for its possession. A confession so involuntarily obtained and induced is certainly not voluntarily given. In *Haynes* v. *Washington*, 373 U.S. 503, 10 L. Ed. (2) 513, P. 520-521, this court held:

> "In short, *The true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.*" (Italics ours).

In *Lynumn* v. *Illinois*, 372 U.S. 528, 9 L. Ed. (2) 922, the evidence positively established that the defendant made a controlled sale of narcotics to a police informer. She had prerecorded money in her possession when she was arrested shortly after the sale. She confessed having made the sale, contending that she was induced so to do because of her fear that if she didn't confess her children would be taken from her and her public assistance would be denied her. In reversing the judgment of conviction, this Court stated, 9 L. Ed. (2) 922, P. 926:

> "We think it clear that confession made under such circumstances must be deemed not voluntary, but coerced."

Petitioner's confession as related by the testimony of Agent Hill was not the product of a free will, but was induced by fear and compulsion. It should not have been admitted into evidence. It violated his fifth amendment constitutional right against self-incrimination.

Moreover, the sole evidence in the case at bar that Petitioner concealed the drugs found in the apartment was this extra judicial confession. The Government witness, Mrs. Hattie Jackson, the owner of the premises and second floor resident thereof, and the co-defendant-Delaney, testi-

fied that Petitioner had not lived in the apartment for over three months prior to April 24, 1964, the date of the seizure, (A. 57-59, 82).

Agent Pringle testified that he, Agents Hill and LaBree, while seated in their automobile, surveilled the premises 8004 S. Yale in the early morning hours of April 24, 1964. While there, Agent Pringle testified he observed Petitioner drive up, exit his automobile, enter the premises and leave shortly thereafter and that he turned his automobile directly in front of the automobile in which the agents were sitting, at which time the agents slid down, (A. 71). He was asked on cross examination, (A. 73):

"Q. And was it because you didn't want to be seen that you slid down?

A. No, Homer Phillips knew me and I knew him."

This question required no more and no less than a "yes" or a "no" answer. Agent Pringle was trained and experienced, not only as a Federal Narcotic Agent in the field of law investigation and enforcement, but in testifying as a witness as well. He was or should have been well aware that his unresponsive answer was prejudicial and brought before the jury facts and matters the jury was not entitled to hear, to Petitioner's detriment. The agent-Petitioner's acquaintanceship certainly was not social. The agent's unresponsive answer left the jury with the indelible impression that the acquaintanceship was occasioned by the agent's previous encounter with Petitioner in narcotic violations.

Agent Pringle was not the only Government witness who brought Petitioner's criminal past before the jury. Agent Hill testified that when they arrived at the Bureau office, Petitioner told him and Agent Pringle that "he would not sign a statement because he didn't want to go to jail,"

(A. 57). Yet, Agent Pringle's testimony of this same conversation—when he asked Phillips' if he would give him a written statement, Phillips said, "No, I don't want to go *Back to Jail* either," (A. 64). This testimony of Agent Pringle, unequivocally related to the jury that Petitioner had previously been in jail. The posture in which the conversation was related unquestionably informed the jury that Petitioner not only had previously been in jail, but had been there because of a narcotic violation. This testimony denied Petitioner a fair and impartial trial.

The Court struck Agent Pringle's testimony of this conversation. But the harm had been done and the Court's instruction to the jury to disregard this conversation failed to cure it. As Mr. Justice Jackson so aptly stated in *Krulewitch* v. *U.S.*, 336 U.S. 440, 93 L. Ed. 790, P. 799:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

Immediately after Agent Pringle had testified that Petitioner told him that he did not want to go back to jail, and the trial court instructed the jury to disregard this portion of Agent Pringle's testimony, the trial court declared a recess and left the bench, (A. 64). Agent Pringle remained seated in the witness box. The jury was excused from the jury box and proceeded to retire to the juryroom. As the jury passed the witness box, one of the jurors, in the presence of the other jurors, said to Agent Pringle You'd better watch that" or "You'd better watch that stuff," (A. 66-67), apparently referring to Agent Pringle's "back to jail testimony." This juror's cordial fraternization with the Government-narcotic agent witness in the other jurors' presence was highly prejudicial to Petitioner. It created an atmosphere and attitude of admiration for the Govern-

ment witness and hostility against Petitioner in the minds of the jurors. Petitioner could not overcome it in spite of the dismissal of the conversant juror, (A. 69). It is respectfully submitted that the Court should have granted Petitioner's motion for a mis-trial, as the trial court granted the Government's motion for a mis-trial in *Simmons* v. *U.S.*, 142 U.S. 143, P. 153-154, 35 L. Ed. 968, P. 971, because of the mere accusation, and no evidence, of acquaintanceship between the defendant and a juror from an unidentified source, which acquaintanceship was denied by both the defendant and the juror, and in *Thompson* v. *U.S.*, 155 U.S. 271, 39 L. Ed. 146, in which the trial court's granting of a motion for a mistrial, because one of the petit jurors had served on the grand jury which returned the indictment against the defendant, was sustained, even though it was not revealed that this juror heard the grand jury evidence or voted for the indictment's return.

Petitioner was denied his constitutional rights to "equal protection of the laws" and "due process of law." The trial court applied one legal principle in granting Defendant-Delaney a new trial. If refused to apply the same principle to Petitioner's motion for a new trial and denied it. The drugs were found in Delaney's apartment and in her presence. The jury found her guilty. Petitioner had not lived there during the three months prior to the drugs' discovery and he was not present when the drugs were discovered. The only evidence of Petitioner's concealment of the drugs was his before-mentioned extrajudicial involuntary confession. The jury found him guilty also.

When asked by the trial court on what point he relied for a new trial, Delaney's counsel answered, "That the weight of the evidence was manifestly not in acord with the verdict. * * * My client wasn't guilty of the charges."

(A. 103). The jury found otherwise. The Court responded, however, (A. 103):

> "The Court: I don't know whether she was or not but it is very difficult for me to feel the certainty with which the jury could have seen the knowledge on her part just from the fact that an agent picks up a telephone book and then she turns around and he says, 'I found this in the telephone book' * * * I don't believe that the jury had a clear basis upon which to find against her and I am going to allow her a new trial on your motion. * * * I will proceed with sentencing as to Homer Phillips at this time."

The Court sentenced Phillips to ten years imprisonment. It is clear that the trial court did not apply the same principle to the two defendants. Had it done so, it would have likewise granted Petitioner's motion for a new trial, or, perhaps more properly, on the Court's stated basis, his motion for judgment of acquittal.

CONCLUSION

The instant judgment and sentence does not measure up to that standard of criminal prosecution expected and required in the Federal courts of the United States of America. We pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

R. EUGENE PINCHAM, EARL E. STRAYHORN and CHARLES B. EVINS
12 W. Garfield Blvd., Suite 200
Chicago, Illinois 60609
DRexel 3-3600

and

SAM ADAM
134 North LaSalle Street, Suite 1622
Chicago, Illinois 60602
CEntral 6-5543
Attorneys for Petitioner Homer Phillips.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—JANUARY SESSION, 1967

No. 15679
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HOMER PHILLIPS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 7, 1967

Before KNOCH, KILEY and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Melsia Delaney and appellant Homer Phillips were indicted for knowingly receiving and concealing a narcotic drug in Chicago on April 24, 1964, in violation of 21 USC § 174. A jury found Mrs. Delaney and Phillips guilty. Phillips was sentenced to imprisonment for 10 years. Mrs. Delaney's motion for a new trial was granted and she subsequently pled guilty to a lesser charge.

Pursuant to a search warrant, Federal Narcotic Agents seized a large quantity of narcotic drugs in the first floor apartment at 8004 South Yale Avenue, Chicago, Illinois, at 3:00 P.M. on April 24, 1964. These drugs were discovered in a telephone book there by Agent Hill in the

presence of Mrs Delaney. Homer Phillips was not in the apartment at the time of the search and seizure.

The evidence showed that at 2:00 A.M. on April 24, 1964, Federal Narcotic Agents Hill and Pringle observed Homer Phillips driving to South Yale Avenue.[1] Phillips parked his car on 80th Street and entered the first floor apartment at 8004 South Yale. Ten minutes later, he left the building and drove his car to the 7100 block of South Halsted Street. After parking, he entered the New Waikiki Lounge at 7112 South Halsted Street. Agent Hill observed Phillips hand his brother Tommie an aluminum foil package, which Tommie put in his overcoat pocket. Shortly thereafter, Johnny Littleton drove Tommie from the tavern to the 4100 block of South Federal Street. The car was then curbed by Agents Hill and Pringle, who identified themselves as Narcotics Agents. At that point, Tommie jumped from the car and ran east through the Chicago Housing Project buildings at 4101 South Federal Street. Agent Hill pursued him and saw Tommie throw an aluminum foil package over a small fence surrounding the Edward Hartigan School. Hill apprehended Tommie in an alley in the vicinity and returned him to Littleton's car, where Agent Pringle was waiting with Littleton. Hill then returned to the place where Tommie had thrown the aluminum foil package and recovered it. The package contained a quantity of white powder.

Agent Pringle searched Tommie and found no other packages on his person. After Pringle and Hill brought Littleton and Tommie to the Bureau of Narcotics, the white powder in the aluminum foil package was tested and shown to contain an opiate. Tommie was subsequently indicted. This record does not show the disposition of his case.

At 8:30 A.M., Hill returned to 8004 South Yale and kept the apartment building under surveillance until Agent Pringle arrived at 3:00 P.M. with a search war-

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[1] Agent LaBree accompanied Agents Hill and Pringle but was not a witness at the trial.

rant. Pringle and Agent Prziborowski entered the front of the building. After no one answered the doorbell of the first floor apartment, Pringle knocked on the door and announced his office and intent. There being no response, Pringle forced the door open and entered. Mrs. Delaney was then walking toward Pringle from the kitchen of the apartment. At that time, Agent Hill entered the rear of the apartment. In searching the living-room, Hill picked up the Chicago telephone directory, and a manila envelope fell from it. The envelope contained a large quantity of white powder. Mrs. Delaney denied that the envelope belonged to her. She also denied knowing Homer Phillips. The white powder was later tested at the Bureau of Narcotics and was found to contain 126 grams of heroin.

Three days thereafter, Homer Phillips was arrested by these Federal Narcotic Agents at the New Bonneville Lounge in Chicago. Phillips admitted that the heroin in the manila envelope found at 8004 South Yale belonged to him. He also admitted that he had lived at the apartment, but not recently. With reference to the manila envelope containing heroin, Phillips told Agent Pringle "Well, you know, that wasn't her [Mrs. Delaney's] stuff that you got out of my pad. That was mine."

Necessity for Hearing on Motion to Quash

Phillips first asserts that it was mandatory for the District Court to hold a hearing on his motion to quash the search warrant and suppress evidence. The motion pointed out that Phillips, as Mrs. Delaney's "boy-friend", had full right of occupancy of the first floor apartment at 8004 South Yale Avenue. His June 2, 1965, motion adopted a May 19, 1965, motion to quash filed by Mrs. Delaney. The pertinent ground of her motion was that the search warrant was improperly executed. If the testimony of Agent Pringle is credited, the entry was valid. 18 USC § 109; *Miller v. United States,* 357 U.S. 301.

Mrs. Delaney's motion was denied on May 24, 1965, "without prejudice". On June 4, 1965, the District Court

continued the case until June 23, 1965, "for trial and ruling on motion of defendant Phillips to quash search warrant and suppress evidence". This contradicts Phillips' claim that he did not renew his motion to quash and suppress because Mrs. Delaney's similar motion had previously been denied. Also, Phillips' seasoned trial counsel would not have adopted her denied motion if he considered the denial to be a complete disposition of the matter. Under Rule 41(e) of the Federal Rules of Criminal Procedure, it was within the Districts Court's discretion to entertain the motion to suppress at the trial instead of passing upon it before trial. Since Phillips' counsel knew that the District Court had already denied Mrs. Delaney's identical motion to quash, it was Phillips' obligation to renew the motion at the trial. *Di Bella* v. *United States,* 369 U.S. 121, 129-130, Note 9; cf. *Cheng Wai* v. *United States,* 125 F.2d 915, 916-917 (2d Cir. 1942).

Our examination of the transcript of the proceedings before the District Court reveals that defendant's counsel was fully aware that the District Court had denied the belated motion of Mrs. Delaney without prejudice and that it would be incumbent upon him to raise the point again if he wished to press it. For example, the following colloquy occurred on September 21, 1965, when the case was called for trial:

> "THE COURT: There is a motion to suppress in this, isn't there, that I will have to hear? Has that been denied on the face of it?
>
> MR. PINCHAM [attorney for Homer Phillips]: Your Honor denied the motion on the face of the petition.
>
> THE COURT: Without prejudice to listen to it in the trial of the case?
>
> MR. PINCHAM: That is right, yes.
>
> THE COURT: So, actually it is just a matter of trying the case.
>
> MR. PINCHAM: That is what it boils down to."

During the November 1965 trial, neither Homer Phillips nor Mrs. Delaney raised their motions to quash the search

warrant and suppress evidence. We agree with the Government that Phillips waived his right to a hearing on this motion because of failure to renew it when the District Court had granted him permission to do so. Phillips' brief concedes that he did not pursue or develop the search warrant execution issue at the trial. It is now too late to present that issue. *United States* v. *Chieppa,* 241 F.2d 635, 637-638 (2d Cir. 1957), certiorari denied, 353 U.S. 973; *Butler* v. *United States,* 153 F.2d 993, 994 (10th Cir. 1946); *Morton* v. *United States,* 147 F.2d 28, 30, Note 4 (D.C. Cir. 1945), certiorari denied, 324 U.S. 875. Furthermore, there was no showing to warrant the granting of a hearing on the motion to suppress inasmuch as the motion contained no offer to prove that the warrant was illegally executed, nor did the prayer of the motion show why a hearing was needed.[2] *United States* v. *Achilli,* 234 F.2d 797, 806 (7th Cir. 1956), affirmed, 353 U.S. 373.

Sufficiency of the Search Warrant Affidavit

Phillips next asserts that the affidavit for the search warrant did not set forth facts to establish probable cause for its issuance.[3] The most recent authoritative consideration of this question appears in *United States* v. *Ventresca,* 380 U.S. 102, 108-109. That case teaches that such affidavits need not be elaborate or technical. The affidavits are to be tested "in a commonsense and realistic fashion". With this test in mind, we have examined the supporting affidavit of Agent Pringle. The affidavit shows that Pringle and others had surveyed the premises at 8004 South Yale during the prior year and had observed several known narcotic peddlers entering and leaving Homer Phillips' first floor apartment there. Pringle stated

[2] The illegal execution point was only mentioned in one conclusory sentence in the 30-page motion to suppress. No factual allegations were made to show why a hearing would be appropriate.

[3] The Government does not claim that this point was waived below.

that he knew that Phillips dealt in narcotics for seven years in Chicago and in St. Louis, and that in 1956 he had been convicted in St. Louis of unlawful possession of narcotics. The affidavit then related the 2:00 A.M. April 24th episode described above.

The cases on which defendant relies antedate *Ventresca*. In many of them the affidavits were based on hearsay. This affidavit was based on Pringle's personal knowledge and amply justified the United States Commissioner's conclusion that there was "probable cause for believing the existence of the grounds for which the warrant was issued" (Rule 41(e) of the Federal Rules of Criminal Procedure). *Walker* v. *United States*, 327 F.2d 597, 598-599 (D.C.Cir. 1963), certiorari denied, 377 U.S. 956; *Chin Kay* v. *United States*, 311 F.2d 317, 320 (9th Cir. 1962).

Testimony Concerning Tommie Phillips

Homer Phillips also contends that the District Court should not have permitted any testimony concerning the 2:00 A.M. Tommie Phillips episode, on the ground that it revealed another crime committed by Homer Phillips. In *United States* v. *Wall*, 225 F.2d 905, 907 (7th Cir. 1955), certiorari denied, 350 U.S. 935, we determined that evidence of other criminal acts is admissible when related to or connected with the crime charged. We also pointed out that such evidence is admissible to show intent or knowledge. Without objection, the District Court's instructions concluded that both intent and knowledge are ingredients of this crime.[4] This accords with *Morissette*

[4] The following are 21 USC § 174 narcotics cases in which evidence of defendant's participation in other narcotics transactions was held admissible to show knowledge or intent: *Medrano* v. *United States*, 285 F.2d 23, 25-26 (9th Cir. 1960), certiorari denied, 366 U.S. 968; *Bible* v. *United States*, 314 F.2d 106, 108-110 (9th Cir, 1963), certiorari denied, 375 U.S. 862; *United States* v. *Abbamonte*, 348 F.2d 700, 704 (2d Cir. 1965), certiorari denied, 382 U.S. 982. In *Medrano* and *Bible* the transactions were clearly more remote in time than those involved in this case.

v. *United States*, 342 U.S. 246, 270, 273 (interpreting Section 641 of the Criminal Code (18 USC§ 641)).

The Tommie Phillips episode tended to show that Homer Phillips knew of the presence of narcotics in the South Yale Avenue apartment and intentionally committed this crime. Here the evidence of another criminal act of Homer Phillips was blended or connected with the crime of which he was accused. Therefore, there was no error in receiving evidence of the Tommie Phillips incident.

Defendant also argues that the Tommie Phillips evidence was objectionable because the defense was taken by surprise. This argument is not well-taken. During the prosecutor's opening statement, defendant's counsel objected just as the prosecutor was reaching the Tommie Phillips incident. During his objection, defendant's counsel told the Court about the Tommie Phillips matter, belying any surprise. Moreover, he cross-examined Agents Hill and Pringle in such detail that he had obviously thoroughly prepared this aspect of the case. Therefore, we consider the claim of surprise to be without merit.

Defendant also asserts that the jury might have confused two crimes: (1) the 3:00 P.M. April 24th, South Yale Avenue unlawful narcotics possession for which he was indicted and (2) the criminal incident involving Tommie Phillips occurring 12 or 13 hours prior thereto. We conclude that sufficient measures were taken in the District Court to dispel any confusion between the two crimes. Thus the District Court gave the following instruction:

> "Now, the indictment charges the defendant with a crime of possession or concealment of narcotics which has been heretofore defined in these instructions. Each defendant is on trial only for the crime that is charged in the indictment and you must decide whether the government has proved that he or she is guilty of that particular crime and beyond a reasonable doubt of that crime alone."

Defense counsel did not submit any written instruction to elaborate upon that point, as required by Rule 30 of the Federal Rules of Criminal Procedure. In fact, he advised the Court that "We don't have any instruction * * *". Any error in the instruction is no longer viable. *United States* v. *Smith*, 283 F.2d 760, 763-764 (2d Cir. 1960), certiorari denied, 365 U.S. 851.

It is noteworthy that during his cross-examination of Agent Hill, defendant's counsel admitted that the Government was not trying Homer Phillips for the Tommie Phillips event. Thus the following colloquy occurred between Phillips' counsel and Agent Hill:

> Q. Now, neither of these defendants [Homer Phillips and Mrs. Delaney] are here charged with having transferred or dispensed that object to Tommie Lee Phillips, are they?
>
> * * *
>
> A. No, sir."

In his closing and rebuttal statements, the Assistant United States Attorney advised the jury on several occasions that it was only to pass upon the April 24th afternoon possession of narcotics at 8004 South Yale Avenue, and that the Tommie Phillips incident was only offered to show Homer Phillips' knowledge and intent, as required by the statute.

We are satisfied that any possible confusion between the two offenses was sufficiently dispelled by the District Court and by counsel for both sides.

On the ground that there was an insufficient chain of evidence, Phillips states that the Government did not show that the package Homer Phillips gave to Tommie Phillips about 2:00 A.M. on April 24 was the same package discarded soon thereafter by Tommie. Without objection, the District Court instructed the jury that circumstantial evidence is proof of a chain of facts to be weighed by the jury. Their verdict showed that they were satisfied that the package transferred from defendant to his

brother and the one found by Agent Pringle were the same package, and that it contained a narcotic drug. The uncontroverted testimony showed that Littleton's car and person and Tommie were searched by Agent Pringle, and no aluminum foil package was found except the one Tommie had discarded at the Edward Hartigan School. Therefore, it was permissible for the jury to conclude that the package found at the school was the same package Homer Phillips had just previously given Tommie in the New Waikiki Lounge. It was the duty of the jury to weigh this evidence. Its finding against defendant was a reasonable one to draw from the evidence and consequently may not be disturbed. *United States* v. *Wilson,* 361 F.2d 134, 136 (7th Cir. 1966).

. Testimony as to Previous Jail Sentence

Defendant complains of Agent Pringle's direct examination testimony as to why defendant did not wish to sign a statement of guilt, defendant stating to Pringle "No, I don't want to go back to jail either". This sentence was volunteered as part of a lengthy answer of Pringle in explaining what occurred when Homer Phillips was arrested. There is no claim that the answer was deliberately elicited by the Assistant United States Attorney. In fact, this subject was raised by defense counsel's prior recross-examination of Agent Hill when Hill was asked "Now, when you got downtown, he [Homer Phillips] told you he wouldn't sign a statement because he didn't want to go to jail, is that right?"

When defendant objected to Pringle's answer, the entire post-arrest conversation between defendant and Pringle was immediately stricken by the District Court. Also, the jury was then and later instructed to disregard any stricken testimony. In view of defendant's own admissions and other strong evidence of guilt, "the conviction is sure that the error did not influence the jury or had but very slight effect", so that the verdict and the judgment should stand. *Kotteakos* v. *United States,* 328 U.S. 750, 764; *United States* v. *Levi,* 177 F.2d 827, 830, 831 (7th

Cir. 1949); *United States* v. *Haskins*, 345 F.2d 111, 115-116 (6th Cir. 1965). Even where a witness testified that a defendant was No. 7 on the national list of major violators of the narcotics laws, the conviction was affirmed because the District Court promptly sustained the objection and instructed the jury to disregard the statement. *United States* v. *Angelet*, 231 F.2d 190, 192 (2d Cir. 1956), certiorari denied, 351 U.S. 952. The brief, unemphasized reference to defendant's having been in jail does not amount to prejudicial error in view of the prompt exclusion of the statement and the instructions given twice by the trial court.[5]

The Court has considered the remaining arguments of defendant and finds them to be insubstantial.

Affirmed.

No. 15679

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent. In my opinion Homer Phillips was denied a fair trial by the admission, over his repeated objection, of the testimony detailing the transaction between defendant and Tommie Phillips, the denial of repeated motions to strike the testimony, and the failure to limit the jury's consideration of that testimony to the element of knowledge and intent. The likely result of these ruling was confusion in the jurors' mind of the offense charged in the indictment with whatever offense was disclosed by the testimony of the Tommie Phillips transaction.

I agree with the majority that defendant was not prejudiced through surprise at the introduction of evidence of the Tommie Phillips transaction. The majority's second reason, as I understand it, for approving the

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[5] *Evenson* v. *United States*, 316 F.2d 94, 95-96 (8th Cir. 1963); see also *Huerta* v. *United States*, 322 F.2d 1, 3 (9th Cir. 1963), certiorari denied, 376 U.S. 954; *Conner* v. *United States*, 322 F.2d 647 (5th Cir. 1963).

admissibility of the evidence, is that this transaction was "blended or connected with" the crime of concealing the narcotics found in the flat. There was no evidence, nor legal inference justified, that the tinfoil package the defendant gave to Tommie Phillips contained heroin taken from the narcotics in the flat. Even if such an inference were justified, the transaction was not relevant to "complete the story of the crime on trial." McCormick, Evidence § 157, at 318 (1954); compare *United States* v. *Levine*, No. 14921, 7th Cir., Feb. 9, 1967.

The third reason stated by the majority, that the Tommie Phillips transaction testimony was offered to prove knowledge and intent, does not of itself justify the admission of the testimony. The underlying purpose of the rule as to admission of "other crimes" testimony is to prevent unfair prejudice to the defendant while admitting all relevant evidence. That purpose is subverted by the majority's result because the prejudice caused by the testimony of the Tommie Phillips incident far outweighs its probative value on the issue of knowledge and intent. A balancing rather than mechanical approach has been applied by the courts where the "other crime" was not substantially similar to the crime charged, *Enriquez* v. *United States*, 314 F.2d 703 (9th Cir. 1963),[1] and has been approved where the issue of intent has not been raised by the defendant. *United States* v. *Smith*, 283 F.2d 760 (2d Cir. 1960) (dicta), *cert. denied*, 365 U.S. 851 (1961); *cf. United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958). The late Professor McCormick sharply criticizes the mechanical approach and cites a number of state cases in support of the balancing approach to the other-crimes evidentiary problem. McCormick, *op. cit. supra* § 157, at 332.

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[1] In *Enriquez*, the Ninth Circuit held that evidence of prior use of marihuana was inadmissible on the issue of intent in a case involving the sale of heroin. 314 F.2d at 717.

In my view the factors to be considered in determining the admissibility of the testimony of the Tommie Phillips transactions are:

1. the weight of the evidence that the defendant committed a crime by participating in the transaction;
2. the probative value of the testimony on the issues of intent and knowledge;
3. the necessity of using it in view of the issues raised by the defendant and the other evidence available to, and used by, the prosecution;
4. the danger of arousing hostility in the jury by showing the defendant to be a "bad man"; and
5. the danger of confusing or misleading the jury by the introduction of a side issue and consuming an undue amount of time.

See *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948); McCormick, *op. cit. supra* § 157, at 332, & § 152, at 319; Uniform Rule of Evidence 45.[2]

On this record, the first two of these factors weigh in favor of admission, but not heavily. With respect to the first, there is some doubt that the defendant committed

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[2] In discussing the background of the rule in a context not relevant here, the *Michelson* Court said:

> The inquiry [into other crimes] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (Footnotes omitted.)

335 U.S. at 475-76.

a crime by handing the tinfoil package to Tommie Phillips. There was no proof of knowledge by defendant that the package given was hard put to show that this package was the one found by the government chemist to contain heroin. As for the second factor, the dissimilarity between an exchange (the "other crime" with Tommie Phillips) and a concealment (the crime charged) would not of itself bar admission on this record. Compare *Enriquez* v. *United States*, 314 F.2d 703 (9th Cir. 1963).[3]

The last three factors, on the other hand, weigh heavily for exclusion of the evidence:

Third factor. There was other evidence not only available but used by the government from which the jury could find intent and knowledge.[4] Moreover there was no substantial issue of intent. Yet the jury was told of the incident in the government's opening argument over defense objection. The first government witness began his testimony by relating the incident, again over objection, and the incident grew in importance as the government's case in chief progressed. A different question would be presented if the defendant had specifically raised the issue of knowledge and intent. The government then might properly meet that defense by introducing the other-crimes testimony on rebuttal. But, in fact, the defendant did not take the stand or offer other evidence on this issue. I think it was unfair to buttress an other-

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[3] It appears from the cases that similarity between the "other crime" and the crime charged need not be as precise in cases involving the intent exception, such as *Enriquez*, as in cases involving the "distinctive handiwork exception. *E.g., compare United States* v. *Wall*, 225 F.2d 905 (7th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956), *with United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958).

[4] There was the finding of the substance, stipulated to be heroin, in the flat used at times by the defendant, the testimony of codefendant Melsia Delaney of her relationship with defendant and the admission of the defendant that both the "pad" (apartment) and the heroin were his.

wise sufficient amount of evidence on this issue with testimony of questionable probative value and undisputable prejudicial effect.[5] *United States* v. *Smith*, 283 F.2d 760 (2d Cir. 1960) (dicta), *cert. denied*, 365 U.S. 851 (1961). The presumption of innocence cannot raise the issue so as to justify serious prejudice in these circumstances.[6] *United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958).

Fourth factor. This testimony unduly prejudiced the defendant by giving an aspect of criminality to him—even if the testimony of the Tommie Phillips transaction was not legally sufficient to show that the defendant com-

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[5] In this context it should be pointed out that the rule and its exceptions are premised upon the inherent existence of prejudice in evidence of other crimes—which, in some circumstances, is overcome by considerations of relevancy.

[6] As Lord Summer, an English jurist, has put it:

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue raised must be the one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice.

Thompson v. *The King*, [1918] App. C. 221, 232.

In *Smith*, the Second Circuit affirmed on the ground that the other crimes was admissible on an entrapment issue. But with respect to the issue of intent, the court said it was not admissible since the "only" issue was whether any sale of heroin had been made. 283 F.2d at 763. In *Magee*, a bank robbery case, this court noted that other bank robberies were not admissible on the issue of intent because there was "obviously" no question of the bank robber's intent, 261 F.2d at 612, and reversed because the other bank robberies were "not connected" to the bank robbery charged.

mitted a crime, it raised the specter of his "bad" character.

Fifth factor (and most important in my view). The undue time and emphasis involved in the testimony of the Tommie Phillips incident, as well as its dramatic impact, must have confused the jury. This was not only the most interesting story in the government's case, it was the first one told. The finding in the flat of the offending heroin, the subject of indictment, was not of comparable interest. And the Tommie Phillips story is the one which must have made the most vivid impression on the jury. Relevancy required showing that the tinfoil package handed to Tommie Phillips contained heroin. This necessitated establishing the "chain of possession" from the time defendant gave Tommie Phillips the package until the contents were chemically tested. And this in turn required introduction of the dramatic details of Tommie Phillips' attempted getaway, the pursuit, the throwing away of the package, and the arrest. Faced with the admission of this evidence, defense counsel was forced to attempt to reduce its effect by challenging, with considerable success, the contents of the package through cross-examination, thus highlighting this evidence for the jury. This diverted the jury to the question: "Did that (Tommie Phillips) package contain heroin?" and away from the central issue: "Did the defendant violate section 174 by possession of heroin in the flat?"

Neither cross-examination by defense counsel nor closing argument by government counsel could supplant the trial court's duty to insure that the jury fully understood the issues and the relevance of the evidence to them. The general instruction quoted by the majority did not adequately fulfil this duty either. The "crime that is charged in the indictment" was not specific enough to distinguish the Tommie Phillips transaction from possession in the

flat.[1] The court's instruction that the indictment charged "possession or concealment" as defined in its previous instructions was no more enlightening to the jury, for both this phrase and the previous instructions were broad enough to apply to both sets of facts.

It is true that defendant tendered no written instruction. His counsel did say, "We don't have any instruction," but this was clearly a reference to a reasonable doubt instruction. A great part of the colloquy over instructions was given to the question of an instruction limiting the testimony of the Tommie Phillips episode to the knowledge and intent element. Defendant's attorney persisted in arguing for an instruction using care to inform the jury that defendant was charged only with possession of the heroin in the flat and not with possession of the heroin which Tommie Phillips received from defendant and threw away. The district court finally decided to give the general instruction set out in the majority opinion, having stated it would not give "the instruction suggested by the defense" because it wanted to instruct generally on the point and not "upon the facts of the case." Defense attorney asked whether the court was "denying the tendered instruction I have suggested. . . ." The court said "Yes."

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[1] The indictment charged:

> That on or about April 24, 1964, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,
>
> HOMER PHILLIPS and MELSIA RUTH DELANEY,
>
> defendants, did then and there fraudulently and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 126.300 grams of heroin, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Section 174, Title 21, United States Code, as amended by the Narcotic Control Act of 1956.

The narcotics cases referred to in footnote 4 of the majority opinion do not militate against my dissent. First of all, determination of whether the general rule or exception applies depends upon the facts in each case. In *Medrano* v. *United States,* 285 F.2d 23 (9th Cir. 1960), *cert. denied,* 366 U.S. 968 (1961), the more detailed instruction given by the court is sufficient to distinguish that case. And there was no indication by the court that the "other crime" was any different from that charged. In *Bible* v. *United States,* 314 F.2d 106 (9th Cir.), *cert. denied,* 375 U.S. 862 (1963), the court instructed the jury at the time the testimony was admitted, and again at the end of the case, with respect to the limitation to the purpose of the testimony. And the crime charged there was precisely the same as the "other crimes." In *United States* v. *Abbamonte,* 348 F.2d 700 (2d Cir. 1965), *cert. denied,* 382 U.S. 982 (1966), the court merely stated the general rule, citing *United States* v. *Massiah,* 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds,* 377 U.S. 201 (1964). And in *Massiah* there was no discussion whatever of the rule. In none of these cases was there any serious question of introducing a side issue which would have confused the jury.

Finally, *United States* v. *Wall,* 225 F.2d 905 (7th Cir. 1955), *cert. denied,* 350 U.S. 935 (1956), cited by the majority as primary authority, does not support admission of the Tommie Phillips incident. That case involved the exception allowing proof of other crimes showing the "distinctive handiwork" of the defendant on the issue of identity. The unique "modus operandi" of the defendant there rendered the other-crime evidence in that case highly probative of identity. And the other-crimes evidence there involved no vivid side issue capable of prejudicing the defendant.

The "bad man" prejudice from the Tommie Phillips incident was aggravated by Agent Pringle's testimony that the defendant had told him he did not want to go "back to jail." I find it impossible to dismiss the "back

to jail" testimony as having "very slight effect" as the majority indicates. Although the reference was obviously "brief," it cannot be called "unemphasized." Immediately following this statement of Pringle's, defense counsel moved to strike the testimony or, alternatively, for a mistrial. The court instructed the jury to disregard that portion of Agent Pringle's testimony and then adjourned court for the day. As the jury filed by the witness stand, one juror remarked to Agent Pringle to the effect that he had "better watch that," clearly referring to the "back to jail" remark that was stricken. If the effect of the testimony and its being stricken impelled one juror to this impropriety. I doubt that it can be said to have had merely slight effect on the other jurors.

Due process required that the jury try Homer Phillips on the crime charged. I have a grave doubt that the jury could have done so on this record. Accordingly, resolving that doubt in favor of defendant, I would reverse and remand for a new trial.

APPENDIX B

CONSTITUTIONAL PROVISIONS, RULE AND STATUTE INVOLVED

UNITED STATES CONSTITUTION,
AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

RULE 41 (e), FEDERAL RULES OF CRIMINAL PROCEDURE:

"*Motion for return of property and to suppress evidence.* A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property, and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing on trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial on hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at trial or hearing."

TITLE 21, SECTION 174, UNITED STATES CODE:

"Whoever fraudently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being

imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

APPENDIX C

COLLOQUY ON SETTLING OF INSTRUCTIONS— FROM VOL. 2 OF THE CERTIFIED RECORD FILED IN THE UNITED STATES COURT OF APPEALS.

651 Mr. Pincham: Judge, may I respectfully object to 4.04—"The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish intent, the Government must prove the defendant knowingly did an act which the law forbids, or knowingly to do an act which the law requires, purposely intending to violate the law. Such intent may be deter-
652 mined from all the facts and circumstances surrounding the case and from similar prior crimes and transactions."

I question first that this offense is a specific intent offense and I question it because the last paragraph of the section creates a presumption and it say—Section 174, Title 21—and correct me if I am wrong, but the substance of it is that whoever is shown to have possession of a drug, it is presumed that it was imported contrary to law, and I think the burden is on the defendant to establish to the satisfaction of the jury that his was something other than unlawful.

• • •

662 The Court: All right, I will take out 4.04, 4.05 and 4.06 . . .

• • •

684 Mr. Plunkett: Your Honor, I did not find a Judge LaBuy instruction on it. He attempted to cover it in that one sentence in 4.04. . . . I would like to tender

this now, . . . It is marked as Government's tender.
685 It is just referred to as 1.

The Court: Is there any objection?

Mr. Pincham: My objection to this instruction—most assuredly, emphatically and zealously there is an objection . . . How is the jury going to know how to apply this, because so far the jury has not been instructed as to what the defendant is here charged with or what narcotic he is charged with. This is something the government injected into the case which
686 has caused the confusion. . . . We emphatically object to this instruction and, while we are on this question, Judge, we are going to ask the Court to instruct the jury to the effect that these defendants are charged and on trial in this indictment with the transportation, concealment, et cetera, of only those narcotic drugs that were allegedly seized from the premises of 8004 South Yale Avenue on the afternoon of April 24, 1964, and they are not charged or on trial for the unlawful transportation or concealment of any other drug, and particularly an instruction to the effect that these defendants are not charged or on trial for the transportation or concealment of any drug allegedly seized from Tommie Phillips in the early morning
687 hours of April 24, 1964 at about 41st and Federal Avenue.

I did a little work last night on this problem, your Honor, and I would like to advise the Court and give the Court the benefit of it because I don't want to at a later date be accused of not having completely and fully advised the Court, in other words, I want the record to completely recite the position of the defendant Homer Phillips so that at a later date, if such time as a later date arrives, if cannot be said of

me I did not advise the trial court as to what our position was.

I would appreciate it if you would give me no more than just five minutes to briefly summarize our position, . . .

720 The Court: Well, this one here before me [government's tendered,] I shall deny . . . I will give 4.04.
721 . . . I think it is 4.04, even though it doesn't give the emphasis that I would like, which gives the law and
722 allows you to argue as far as you wish your facts within the scope of that law. The same thing is true with the instruction suggested by the defense. I think it is unnecessary. I dislike entirely ever commenting directly upon the facts of the case in my instructions. I want them to have general principles of law. So that will be denied. The other motions will be denied.

We will take a five minute recess and I will have the jury brought in.

Mr. Pincham: Your Honor, do I understand that you are denying the tendered instruction I have suggested when I stood before the bar—

The Court: Yes.

Upon Conclusion of the Court's Charge to the jury.

822 Mr. Pincham: My other motion, if your Honor please,—I understand we must again state our objections with regard to the instructions, and my objection here—and I do not say this to minimize it,
823 but my objection is that the jury has not yet been instructed by instruction from the Court on what the indictment charged the defendants with or that it does not charge the defendants with the possession nor transportation of the drugs which Tommie Lee Phillips had. This, of course, is occasioned by the problem of

separate transactions being injected into the case, and because of the Court's failure to instruct the jury as to what narcotics the defendants were being charged with transporting, concealing, et cetera, and because of the Court's failure to instruct the jury they are not on trial for the transportation, concealment, et cetera, of the narcotic drugs Tommie Lee Phillips had the evening of April 24, '64, we object to that failure of the Court to so instruct.

The Court: Are there any other objections?

Mr. Gerber: I think Mr. Pincham has—

Mr. Pincham: Well, I am dubious, but did I object to the specific intent thing?

824 Mr. Gerber: Yes, you did.

Mr. Pincham: I thought I did.

Mr. Berber: I think that was the Court's recommendation.

The Court: Those objections may stand of record as objections to the charge in the case. In addition, all other objections heretofore made to the instructions with the agreement of the parties may stand as objections to the charge of the Court as it has been delivered to the jury.

APPENDIX D

The affidavit for the search warrant is in words and figures as follows, (A. 14-16):

"UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
Commissioner's Docket No. 22

V.

Case No. 10875

A two-story brick building,
first floor apartment
located at 8004 S. Yale,
Chicago, Illinois

AFFIDAVIT FOR SEARCH WARRANT

Before C. S. Bentley, Pike Room 828 U.S. Courthouse, 219 S. Clark Street, Chicago, Illinois. The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as the first-floor apartment located at 8004 Yale, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely a quantity of narcotic drugs, which are being concealed in violation of Title 21, Section 174, United States Code, and that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: Investigation conducted at the above-described premises by Federal Bureau Narcotic Agents. During the past year surveillance has

been conducted on the above-described premises at 8004 S. Yale by affiant and Federal Bureau of Narcotic Agents Hill, LaBree, Prziboroski and Coulter, and has disclosed several known narcotic peddlers to enter and exit the first floor apartment at this address, which apartment is occupied by Homer Phillips. The affiant further states he knows Homer Phillips to have dealt in narcotics for over seven (7) years, both in Chicago, Illinois, and St. Louis, Missouri, and that in 1956 he was convicted in the United States District Court in St. Louis, Missouri for possession of narcotics. On April 24, 1964, the affiant and Agent Hill observed one Homer Phillips to exit the front door and to enter his 1963 Pontiac convertible, License No. GU-5884. Investigation has further determined that Homer Phillips has lived on the first-floor apartment at the above-described address for over one year. On the date in question, Homer Phillips drove to 7112 South Halsted in Chicago, and entered a tavern known as the New Waikiki Lounge, where he was observed by Agent Hill and the affiant to meet with his brother, Tommie Lee Phillips, at which time he handed Tommie Lee Phillips a small tin foil package. Tommie Lee Phillips and one Johnny Littleton were observed by Agent Hill and affiant to leave the tavern and enter Littleton's 1963 Ford convertible, License No. 887-303. Tommie Lee Phillips was seated in the passenger's seat. Phillips and Littleton drove to the 4100 block of Wentworth, at which time they were stopped by Agent Hill and the affiant, who identified themselves as Agents of the Federal Bureau of Narcotics. Previous to this time, on April 2, 1964, Federal Bureau of Narcotics Agent Donald Tucker purchased a quantity of narcotics from one Lonnie Hatch. Tommie Lee Phillips was the source of supply in this case. At the time he stopped

Littleton and Phillips Agent Hill announced they were under arrest. At this time Phillips jumped out of the car and ran east towards State Street. As he neared State Street, he threw away a small tin foil package. This package was recovered by Agent Hill, the contents of which have been analyzed and found to contain 29.220 grams of heroin hydrochloride, a narcotic drug. Phillips was subsequently apprehended. The affiant further states that he knows tin foil packages are customarily used by narcotic peddlers as containers for narcotics."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Tuesday, March 7, 1967

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HOMER PHILLIPS, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15679

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, April 5, 1967

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HOMER PHILLIPS, Defendant-Appellant. No. 15679	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 134

HOMER PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 375 F. 2d 75.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1967. A petition for rehearing was denied on April 5, 1967. The petition for a writ of certiorari was filed on May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, proof of an earlier transaction in narcotics was admissible to show

defendant's knowledge of the existence of, and his dominion over, narcotics.

2. Whether petitioner was denied a fair and impartial trial because of inadvertent references to facts from which the jury could have deduced that he had a criminal record, or because of misconduct on the part of one juror, who was subsequently dismissed.

3. Whether petitioner's admission to arresting agents was properly received in evidence.

4. Whether petitioner was improperly denied a hearing on his motion to quash a search warrant and to suppress evidence and whether the search warrant was based on probable cause.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of concealing a narcotic drug in violation of 21 U.S.C. 174. On January 31, 1966, he was sentenced to imprisonment for ten years. The court of appeals affirmed the conviction, one judge dissenting (Pet. App. A).

Petitioner was observed entering, in the early morning hours of April 24, 1964, a building at 8004 South Yale Street in Chicago. Approximately ten minutes later he left the building and drove to the New Waikiki Lounge. He was observed there handing an aluminum foil package to his brother, Tommie Lee Phillips, who then drove away with one Johnny Littleton. When federal narcotics agents halted the automobile and announced their identity, Tommie Lee Phillips fled. During his flight, he threw an aluminum foil

package over a small fence. The package was recovered and was found to contain an opium derivative (A. 39–42).[1]

Narcotics agents continued the surveillance of the building at 8004 South Yale Street on the following day. At approximately 3:00 p.m. agents Przibórowski and Pringle arrived with a search warrant. They rang the door bell three times without eliciting any response. Agent Pringle then knocked on the door and announced his office, again without receiving any response. The agents then kicked in the door and, as they were entering, encountered co-defendant Melsia Delaney as she was approaching from the kitchen. Pringle again announced his office, and conducted a search. A manila envelope containing 126.3 grams of heroin hydrochloride was found in a telephone book (A. 43, 45, 62–64, 77). Mrs. Delaney denied knowledge of the presence of the narcotic drug and denied knowing petitioner (A. 44). When petitioner was arrested two days later, he admitted possession of the narcotics found at Mrs. Delaney's apartment and stated that he had lived there at one time (A. 46). The indictment charged petitioner and Mrs. Delaney[2] with concealing the 126.3 grams found in her apartment.

ARGUMENT

1. The testimony regarding petitioner's departure from the apartment, his handing his brother a pack-

[1] "A." designates appellant's appendix; "R.", the transcript of record on appeal; "Tr.", the transcript of trial; and "M. Tr.", the transcript of miscellaneous proceeding. All are on file with the Clerk of this Court.

[2] Mrs. Delaney was convicted by the jury, but a new trial was ordered as to her.

age of narcotics, and the eventual recovery of the package, was properly admitted as bearing on petitioner's knowledge of the existence of, and his dominion and control over, the narcotics later found in the search of the apartment. In view of the fact that petitioner was not in the apartment when the drugs were found, and that Mrs. Delaney denied knowing petitioner, it was clearly relevant to prove that petitioner had used the very apartment to carry on a trade in narcotics. It was within the discretion of the trial court to permit introduction of evidence of a similar and connected crime that tended to prove an element of the crime for which the defendant was being tried—knowledge of and dominion and control over the narcotics found in the apartment. See *United States* v. *Abbamonte*, 348 F. 2d 700, 704 (C.A. 2), certiorari denied, 382 U.S. 982; *Bible* v. *United States*, 314 F. 2d 106, 108–110 (C.A. 9), certiorari denied, 375 U.S. 862.[3]

During cross-examination of Agent Hill (who had recovered the aluminum foil package thrown by Tommie Lee Phillips), it was emphasized that petitioner was not being tried for that alleged transfer of

[3] Petitioner suggests (Pet. 15) that there was no evidence showing that the aluminum foil package actually contained an opium derivative. As petitioner concedes, the agent testified that he submitted the package to the U.S. Chemist, and the Chemist testified that he received a package from the agent. Petitioner contends that there was no direct proof that the package which the agent submitted to the Chemist—the package recovered from Tommie Lee Phillips—was the same package received by the Chemist. But the jury could reasonably conclude that the package which the agent submitted to the Chemist and the package the Chemist received and analyzed were one.

heroin to his brother.[4] During closing argument, the Assistant United States Attorney stated that the evidence relating to the Tommie Lee Phillips episode was offered solely to show petitioner's dominion and control over Mrs. Delaney's apartment and his knowledge that narcotics were concealed in it (Tr. 733, 736–737, 792–793). And in its instructions the trial court charged the jury (A. 91, 96):

> Before a defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act.
>
> * * * * *
>
> Now, the indictment charges the defendant with a crime of possession or concealment of narcotics which has been heretofore defined in these instructions. Each defendant is on trial only for the crime that is charged in the indictment and you must decide whether the government has proved that he or she is guilty of that particular crime and beyond a reasonable doubt of that crime alone.

Thus, the instructions of the trial court, amplified by argument of counsel on both sides, emphasized to the jury that petitioner was being tried for the conceal-

---

[4] The following colloquy took place (Tr. 203–204):

> Q. [By Mr. Pincham, defense counsel]. Now neither of these defendants are here charged with having transferred or dispensed that object to Tommie Lee Phillips, are they?
>
> * * * * *
>
> A. [By Agent Hill]. No, sir.

ment of narcotics in Mrs. Delaney's apartment and for that crime alone.

Petitioner charges that the evidence of the earlier narcotics transaction took him unfairly by surprise. But he was fully apprised of the transaction prior to trial, in connection with his motion to quash the search warrant, and, although advised by the government's opening statement that the government would offer this evidence as proof of petitioner's knowledge (Tr. 12, 24–26), he did not seek a continuance or otherwise move for additional time in which to prepare a defense. Nor was he denied his Sixth Amendment right to confrontation. The government was not required to call Tommie Lee Phillips. See *In re Curtis*, 36 F.Supp. 408 (D. D.C.), affirmed, 123 F. 2d 936 (C.A. D.C.). And both Pringle and Hill—who testified to the events surrounding the Tommie Lee Phillips episode—were cross-examined by petitioner. Finally, petitioner was not deprived of his right to compulsory process since he did not seek process at any time to compel the attendance of Tommie Lee.

2. During the direct examination of Agent Pringle concerning the circumstances surrounding petitioner's admission (discussed *infra*, p. 8), Pringle testified that petitioner, in refusing to make a written statement, had said, "No, I don't want to *go back to jail either.*" (A. 64; emphasis added.) Later, on cross-examination, in response to a question posed by petitioner's counsel, Pringle testified that petitioner had known him prior to the arrest for the crime charged herein (A. 73). Petitioner contends

that the government was deliberately attempting to communicate to the jury that petitioner had had previous brushes with the law. We disagree.

Pringle's comment that petitioner had said that he did not want to go back to jail was merely an incident of the agent's description of the circumstances of the admission. It is clear from the context that it was not a deliberate attempt to prejudice petitioner in the eyes of the jury. In any event, at petitioner's request, the entire conversation was stricken from the record, and the jury was admonished to disregard the statement completely (A. 65–66). Presumably, these instructions were obeyed. *Opper* v. *United States,* 348 U.S. 84, 95; see, also, *Delli Paoli* v. *United States,* 352 U.S. 232, 242. Pringle's testimony that petitioner had known him prior to the arrest did not necessarily imply that petitioner had a criminal record. Since the statement was responsive to a question posed by petitioner's counsel, petitioner should not be heard to complain. *United States* v. *Spatuzza,* 331 F. 2d 214, 216–217 (C.A. 7), certiorari denied, 379 U.S. 829; *Carter* v. *United States,* 231 F. 2d 232 (C.A. 5).

3. Shortly after the court admonished the jury to disregard Pringle's statement that petitioner had said he didn't want to go back to jail, one of the jurors was observed to smile at Pringle and say, "You better watch that stuff", or "You ought to watch that", or words to that effect (A. 66). The court dismissed the juror, but denied petitioner's motion for a mistrial based on the incident (A. 69–70). Since the juror did not participate in the determination of petitioner's

guilt or innocence, there is no basis for a claim of prejudice. See *United States* v. *Collier*, 362 F. 2d 135, 137–138 (C.A. 7), certiorari denied, 385 U.S. 977.

4. Upon his arrest two days after the narcotics were found concealed in Mrs. Delaney's apartment, petitioner said that he did not want to see her go to jail and admitted that the narcotics were his (A. 45–46).[5] Petitioner contends that this admission was inherently involuntary and inadmissible since the statement was induced by the fear that his "girl friend" might otherwise go to jail (Pet. 26–27). No threats were made by government officials that if petitioner did not admit ownership of the narcotics Mrs. Delaney would go to jail. His statement was voluntarily and spontaneously given; any "compulsion" was within him.[6]

5. Prior to trial, petitioner's co-defendant moved to quash the search warrant and suppress the heroin found in her apartment. The motion was denied without prejudice (R. 68). The court thereafter granted petitioner's motion to join in and adopt his co-defendant's motion to suppress (R. 71). In a pre-trial argument with respect to the validity of the search warrant, the following colloquy occurred (M. Tr. 42):

---

[5] Q. [By Mr. Plunkett]. After that discussion, did you have further discussions?

A. [By Agent Hill]. Yes, sir. Agent Pringle asked Phillips if the heroin belonged to him and * * * [h]e first said no, then he said he didn't want to see Ruth go to jail. He said it was his stuff.

[6] *Haynes* v. *Washington*, 373 U.S. 503, and *Lynumn* v. *Illinois*, 372 U.S. 528, are thus inapposite, since in both cases the compulsion which caused the confession or admission was brought to bear by government officials.

> The COURT. Let's see, this motion was made by your co-counsel—what is his name:
>
> Mr. PINCHAM. Mr. Gerber, yes.
>
> The COURT. Mr. Gerber. It was a motion to suppress. It alleged that the search warrant was invalid. However, under the principles laid down in the [*Ventresca*] case [*United States* v. *Ventresca*, 380 U.S. 102] I find that it was not and I deny the motion without prejudice. Of course it is always without prejudice. We will hear the case. We will try the case.

On another occasion, prior to trial, this colloquy occurred (M. Tr. 72–73):

> The COURT. There is a motion to suppress in this, isn't there, that I will have to hear? Has that been denied on the face of the petition?
>
> Mr. PINCHAM. Your Honor denied the motion on the face of the petition.
>
> The COURT. Without prejudice to listen to it in the trial of the case?
>
> Mr. PINCHAM. That is right, yes.
>
> The COURT. So actually it is just a matter of trying the case.
>
> Mr. PINCHAM. That is what it boils down to.

When the government offered the seized narcotics for admission into evidence, petitioner's counsel objected "for the reasons and on the grounds relied upon and urged and set forth in the petition of the defendants to quash the search warrant and to suppress the evidence" (Tr. 444–445).

Petitioner now contends that he did not know that the trial judge was hearing the motion to suppress

together with the trial of the case,[7] and that he was therefore denied an opportunity to present further evidence with respect to that motion. But from the quoted colloquies it is apparent that petitioner's counsel was fully aware that the trial court was hearing the motion to suppress during trial, as permitted by F.R. Crim. P. 41(e), and that he deliberately waived the presentation of further evidence on that issue. At all events, the only issue raised with regard to the search, besides the validity of the warrant (see *infra,* pp. 10–11), concerned the execution of the search, and on that point Mrs. Delaney testified for the defendants. Even now petitioner does not suggest that he had other witnesses to testify regarding the validity of the search, and accordingly there is no basis for any claim that he was prejudiced.

6. Petitioner's contention that the search warrant was not supported by probable cause is without merit. The affiant, agent Pringle, alleged, *inter alia,* that he had observed known narcotic peddlers enter 8004 South Yale Street, that he knew petitioner Phillips as a convicted dealer of narcotics, and that he knew that petitioner had resided at that address some time before. Pringle also alleged in detail the circumstances of the Tommie Lee Phillips episode in which petitioner, after leaving 8004 South Yale Street, handed his brother an aluminum foil package of a kind commonly used in the narcotics trade which was recovered and found to contain an opium derivative

[7] At a post-trial motion, Judge Parsons advised counsel that he had in fact heard the motion to suppress during the trial (A. 98–99).

(A. 14–16; Pet. App. D). In these circumstances, the commissioner was clearly and adequately advised of detailed facts, known personally to the affiant, upon which a finding of probable cause for a search of the apartment could properly be based. *United States* v. *Ventresca,* 380 U.S. 102; *Walker* v. *United States,* 327 F. 2d 597 (C.A. D.C.), certiorari denied, 377 U.S. 956.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

JULY 1967.

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